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WM. R. STANSB
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IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. ~~958~~ 764

In the Matter of the Petition of The Atchison, Topeka and Santa Fe Railway Company, a Corporation, for a Writ of Certiorari, Directed to the United States Circuit Court of Appeals for the Ninth Circuit, to Bring Before the Supreme Court the Case of O. J. Nichols,

Plaintiff in Error,

vs.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation,

Defendant in Error.

PETITION FOR CERTIORARI.

E. W. CAMP,
PAUL BURKS,
ROBERT BRENNAN,
Attorneys for Petitioner.

GARDINER LATHROP,
Of Counsel.

Parker, Stone & Baird Co., Law Printers, 241 New High St., Los Angeles.

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Plaintiff in Error,

vs.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation,

Defendant in Error.

Petition for Certiorari.

To the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit reversing a judgment in favor of your petitioner in the case of O. J. Nichols v.

The Atchison, Topeka and Santa Fe Railway Company, a corporation, and carried to said Circuit Court of Appeals by writ of error, and respectfully shows to this court as follows:

Statement of the Case.

I.

Your petitioner was, at the time of the commencement of the action hereinafter specified, and still is, a corporation, a citizen and resident of the state of Kansas, and was at said time and still is a common carrier engaged in interstate commerce by railway and between the states respectively, among others, of Illinois, Missouri, Kansas, Colorado, New Mexico, Arizona and California, operating regular passenger trains for the transportation of persons for hire.

II.

In June, 1920, Mary J. Nichols was a passenger on one of petitioner's said trains en route from Fallbrook, California, to Chicago, Illinois, and when passing through the state of New Mexico she was thrown from the car in which she was riding by a jerk or jar of the train and received injuries from which she died in the state of New Mexico on the 1st day of July, 1920.

III.

In June, 1921, O. J. Nichols, the surviving spouse of said deceased, in his individual capacity, brought an action against your petitioner in the Superior Court of the state of California, in and for the county of Los Angeles, for the death of his wife, alleging that he had been thereby damaged in the loss of her services and advice in the sum of $15,000.00, in the loss of her society, love and affection in the sum of $20,000.00, and further damaged in the amount of $586.42 for expenses incident to the last illness and burial of his wife, for railroad fare and various other specified expenses.

Your petitioner, the defendant in said action, within the time allowed by law, asked for and secured the removal of said action into the United States District Court for the Southern District of California, Southern Division, on the ground of diverse citizenship, where the case was tried before the court, without the intervention of a jury, a jury having been waived by written stipulation of the respective parties. The trial resulted in these findings of fact:

"First: That all the allegations in the complaint and the amendment thereto are true, except as to the amount of damages sustained by the plaintiff;

Second: That the amount of damages sustained by the plaintiff is the sum of $5,000.00;

Third: That the allegations of the answer of the defendant are not true."

And as a conclusion of law, the court found that your petitioner, the defendant in said action, was entitled to judgment and a judgment to that effect was entered.

The case was carried by the plaintiff in error to the United States Circuit Court of Appeals for the Ninth Circuit by writ of error.

The assignment of error raised but one question, to-wit: Whether judgment should have been entered for your petitioner, the defendant in error therein, or should have been entered for the plaintiff in error for $5,000.00.

IV.

During all of the times herein mentioned, the only recovery allowed by the laws of New Mexico for the death of a passenger on a railroad train resulting from or occasioned by negligent operation or by any defect or insufficiency in any railroad or any part thereof or in any locomotive was and is that given by section 1820 of the New Mexico Annotated Statutes, 1915; that statute is also contained in the Compiled Laws of New Mexico of 1884 as section 2308, and in the Compiled Laws of a later edition as section 3212 and reads as follows:

> "Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskilfulness or criminal intent of any officer, agent, servant or employee whilst running, conducting or managing any locomotive, car or train of cars,

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> "Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskilfulness or criminal intent of any officer, agent, servant or employee whilst running, conducting or managing any locomotive, car or train of cars,

or of any driver of any stage-coach or other public conveyance whilst in charge of same as driver, and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or in any stage-coach or other public conveyance, the corporation, individual or individuals in whose employ any such officer, agent, servant, employee, engineer or driver shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage-coach or other public conveyance at the time any injury is received, resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying the sum of five thousand dollars, which may be sued for and recovered, first, by the husband or wife of the deceased, or, second, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased, or, third, if such deceased be a minor and unmarried, then by the father and mother who may join in the suit and each shall have an equal interest in the judgment, or, if either of them be dead then the survivor. In any suit instituted under this section it shall be competent for the defendant or his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency."

V.

That thereafter, to-wit, on the 22nd of January, 1923, the said Circuit Court of Appeals rendered and filed an opinion written by His

Honor Judge Ross, reversing the judgment before it for review, and directing a judgment to be entered in said United States District Court for the Southern District of California in favor of said O. J. Nichols, the plaintiff in error, for $5000.00; the said Circuit Court of Appeals in its said decision and opinion holding in effect, in accordance with the contention of your petitioner, as the basic rule of law applicable in the case, that it was governed by the rule that would have controlled had the cause not been removed into the federal court.

The said Circuit Court of Appeals in its said decision and opinion, in accordance with your petitioner's contention, further held in effect that the only recovery allowed by the laws of New Mexico for the death of the said Mary J. Nichols was that given by said section 1820 of the New Mexico Annotated Statutes, 1915 edition. But that said statute, according to the decision and opinion of said Circuit Court of Appeals, was not penal in character and would therefore be enforced and administered in the court of California and in the federal court sitting in that state, notwithstanding the contention of your petitioner that said New Mexico statute declared a policy of law inconsistent with the policy of the state of California in which the suit was brought, and was so opposed to the policy of California that no court

of that state would enforce it; and your petitioner respectfully submits that to determine the New Mexico statute non-penal is not an answer to the question whether a recovery thereunder would be permitted in the state court of California. The said Circuit Court of Appeals rested its decision and opinion on the authority of Huntington v. Attrill, 146 U. S. 657.

VI.

Before and since the decision of Huntington v. Attrill, the statute here in question or the like statute of Missouri had been attempted to be used as a basis of recovery, and in every instance where made the basis of an action in another state either before or since the case of Huntington v. Attrill, recovery has been refused.

In the case of Marshall v. Ry. Co., 46 Fed. 269, the Missouri statute, like the one in question, had been attempted to be used as a basis of recovery in the federal court in Ohio. In considering the statute, Judge Sage said:

> "Where the plaintiff is not required to offer any evidence proving damages and the defendant is not permitted to offer any evidence disproving damages, and recovery is to to be one fixed sum in every case, I cannot understand how the statute under which that is done can be regarded as providing compensation merely, and not penal."

Judge Sage makes this very pertinent suggestion:

> "I doubt whether the Legislature has the power to enact a statutory provision for liquidated damages even where it has the right to create a cause of action. It may for reasons of public policy enact and enforce a penal statute and provide that the plaintiff shall have the benefit of the penalty, but if the statutory damages are to be treated as compensatory merely, it strikes me that the attempt of the Legislature to fix them by an arbitrary, inflexible rule would be in conflict with the constitutional right of the defendant to a jury trial."

Since the decision of Huntington against Attrill, the state courts of Texas, Kansas, Iowa and Illinois have refused a recovery thereunder:

Clay v. Ry. (Tex.), 228 S. W. 907;
Dale v. Atchison, 57 Kan. 601, 47 Pac. 521;
Matheson v. Ry. Co., 61 Kan. 667, 60th Pac. 747;
Armbruster v. Ry. Co., 166 Ia. 155, 147 N. W. 337;
Raisor v. Ry. Co., 215 Ill. 47, 74 N. E. 69.

A similar case is:

Christilly v. Warner, 87 Conn. 461, 88 Atl. 711.

That this Honorable Court has approved and adopted, if not encouraged the refusal of state

courts to entertain actions on foreign statutes, not harmonizing with the policy of the forum, is reflected in the case of Slater v. Mexican National Ry. Co., 194 U. S. 120.

In Mo. Pac. v. Ault, 256 U. S. 554, there came before this Honorable Court a suit to recover wages under a statute of Arkansas, providing that if a railroad company should discharge an employee it shall pay him his full wages within seven days, otherwise as a penalty for such non-payment the wages of such employee should continue at the same rate until paid. In the lower court Ault recovered $50.00, his wages up to the time of his discharge, and $390.00 wages from that date on. The court held that everything above $50.00 was penalty or forfeiture, but said it was in the nature of punishment; that the Supreme Court of Arkansas had held that it is not technically a penalty, but was allowed for a double purpose, namely, as compensation for delay and as punishment for failure to pay; that it had all the elements of exemplary damages. This Honorable Court said:

> "Whatever name be applied, the element of punishment clearly predominates."

Hence it was held that the judgment against the director general of railroads, insofar as it provided for the recovery of the penalty, was erroneous.

Your petitioner therefore shows unto this Honorable Court that there is a conflict of decision and opinion among the lower federal courts and particularly is there an irreconcilable conflict between the decision and opinion of the Honorable Circuit Court of Appeals for the Ninth Circuit, here sought to be reviewed, and the decision and opinion of the United States District Court in the case of Marshall v. Wabash, 46 Fed. 269, and the further irreconcilable conflict of decision and opinion between the said Circuit Court of Appeals and the Supreme Court of the states of Texas, Kansas, Iowa and Illinois, respectively; and the decision and opinion of said Circuit Court of Appeals is irreconcilable with the case of Gallagher v. Ry., United States District Court, Southern District, N. Y., 196 Fed. 1000, in which Judge Mayer refused to enforce or administer a statute of Florida in an action in a federal court in New York, because contrary to the spirit and policy of the laws of the forum.

The decision and opinion of the said Circuit Court of Appeals, it is submitted, is irreconcilable with the decisions and opinions of said federal and state courts, particularly since the Supreme Court of Missouri in construing the statute of that state, from which the New Mexico statute was copied, held in the case of Grier v. Ry. Co., 228 S. W. 454, that the statute was

penal, as also to the same effect is the decision of the Springfield Court of Appeals of Missouri in the case of Pryor v. Payne, 244 S. W. 369, wherein it was held that there could be no recovery against the director general of railroads under the Missouri statute for the death of a traveler on a highway crossed by a railroad because of any neglect in the operation of the train which killed the traveler, since such statute is properly penal and in no sense compensatory.

Your petitioner further shows to this Honorable Court that the United States Circuit Court of Appeals for the Eighth Circuit had before it the case of Hopper v. Denver etc. R. Co., reported in 155 Federal at page 273. There the plaintiff sued to recover from the railroad company damages for the death of his daughter, under a Colorado statute which created an action for death negligently caused by a public carrier and which statute declared that every such public carrier should forfeit for every person and passenger so injured or killed not more than $5000.00, nor less than $3000.00.

Justice Van Devanter, who delivered the opinion of the court, not only left open for further consideration the question of the validity of such a statute, but also passed for further consideration the question as to whether the statute, if valid, could be enforced outside of the state court of Colorado. In other words,

Justice Van Devanter left open the question as to whether the Colorado statute could be enforced or administered in a federal court sitting in Colorado, with this very pertinent observation:

> "It may be that in the further progress of the case it will become necessary to consider whether the provision in section 1508 for a minimum recovery of $3000, irrespective of actual pecuniary injury, is valid, and, if so, whether that section is thereby made penal in the sense that it may be enforced only in the courts of Colorado (see Philpott v. Missouri Pac. Ry. Co., 85 Mo. 164; Carroll v. Missouri Pac. Ry. Co., 88 Mo. 239, 246, 57 Am. Rep. 382; Marshall v. Wabash R. Co. (C. C.), 46 Fed. 269; Dale v. Atchison etc. Co., 57 Kan. 601, 47 Pac. 521; Matheson v. Kansas City etc. Co., 61 Kan. 667, 60 Pac. 747; Adams v. Railroad Co., 67 Vt. 76, 30 Atl. 687, 48 Am. St. Rep. 800; Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123; Stewart v. Baltimore & Ohio R. R. Co., 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; Brady v. Daly, 175 U. S. 148, 25 Sup. Ct. 62, 44 L. Ed. 109; Boston & Maine R. R. Co. v. Hurd, 47 C. C. A. 615, 108 Fed. 116, 56 L. R. A. 193; s. c. 184 U. S. 700, 22 Sup. Ct. 939, 46 L. Ed. 765; McCabe v. American Woolen Co. (C. C.), 124 Fed. 283; s. c. 65 C. C. A. 59, 132 Fed. 1006; Malloy v. American Hide & Leather Co. (C. C.), 148 Fed. 482; Wharton's Conflict of Laws (3d Ed.), Secs. 4b, 480a; Atlanta v. Chattanooga Foundry, 61 C. C. A. 387, 392, 127 Fed. 23, 28, 64 L. R. A. 721; s. c. 203 U. S. 390, 397, 27 Sup. Ct. 65, 51 L.

Ed. 241; Johnson v. Southern Pac. Co., 196 U. S. 1, 17, 25 Sup. Ct. 158, 49 L. Ed. 363.)"

VII.

On the 16th day of February, 1923, and within the time prescribed by the rules of said Circuit Court of Appeals, your petitioner filed with the clerk of said court its petition for a rehearing in said entitled cause, which said petition was on the 26th day of February, 1923, denied.

VIII.

On the 2nd day of March, 1923, upon the application of your petitioner, said Circuit Court of Appeals made an order in said cause, withholding the issuance of its mandate for a period of thirty days next after said date, to enable your petitioner to apply to this Honorable Court for a writ of *certiorari* to review said decision and opinion.

IX.

Your petitioner furnishes and submits herewith as an exhibit to this petition a certified copy of the entire transcript of record in the case, including the proceedings in said Circuit Court of Appeals for the Ninth Circuit, to which the writ of certiorari is asked to be directed herein.

X.

The questions and propositions of law involved herein are substantially as follows:

1. That the plaintiff in said suit of O. J. Nichols against your petitioner has no remedy except under section 1820 of the Laws of New Mexico, edition of 1915.

This is settled by the decision of the Supreme Court of New Mexico rendered in 1903 in the case of Romero v. Atchison etc. Company, 11 N. M. 679, 72 Pac. 37. The decision and opinion of the Circuit Court of Appeals in the instant case rests upon the same hypothesis.

2. Was the Circuit Court of Appeals correct in its decision and opinion that the New Mexico statute was not penal in character and would be enforced in a state court of California?

3. Conceding (but not admitting) the correctness of the premise that the New Mexico statute here involved is non-penal in character, still may the "new and extraordinary civil liability upon those causing death," created thereby, by subjecting common carriers alone to the payment of a forfeit of $5000.00 without regard to the pecuniary loss sustained, be enforced in a court of California, in view of the settled policy of that state that the amount of damages, when the death of a person is caused by wrongful act or neglect of another, shall be determined according to the evidence of pecuniary loss and

that they shall be strictly compensatory for the pecuniary loss as proved, particularly in view of section 377 of the Code of Civil Procedure of the state of California, which is a new action and not the action which the deceased might have brought for the wrong had he survived, applicable to all defendants alike? That code section reads as follows:

> "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

4. The District Court of Appeal of California in the case of McManus v. Red Salmon Canning Co., 37 Cal. App. 133, decided that an action for wrongful death is governed by the law of the jurisdiction where the *tort* was committed, is transitory, and may be maintained in any jurisdiction where the defendant is found, *unless the court where the suit is brought in enforcing the remedy would be acting in conflict with the general policy of the law of its own jurisdiction.*

In view of this decision it is submitted that the New Mexico statute here involved would not be enforced in a court in California because it is contrary to the policy of that state as defined by said section 377 of its Code of Civil Procedure and as expounded by its Supreme Court in the cases of:

Lange v. Schoettler, 115 Cal. 388;
Redfield v. Oakland Ry. Co., 110 Cal. 277;
Parsons v. Easton, 184 Cal. 765.

5. While the courts of California have not been asked to enforce this statute of New Mexico, the courts of other states, having the same policy that California has concerning the measure of damages, have repeatedly refused to allow a recovery under the New Mexico statute, or under the statute of Missouri from which the New Mexico statute was copied.

6. The Circuit Court of Appeals rests its decision and opinion on the theory that the instant case is ruled by the doctrine of the case of Huntington v. Attrill, 146 U. S. 657. But it was not necessary to a decision in that case to determine whether the New York statute there under consideration was remedial or penal, since the appeal was founded upon the "full faith and credit" clause of the Federal Constitution. The decision was based really upon a consideration

of the remedial purpose of the statute in its protective aspect to a creditor:

Patterson v. Thompson, 86 Fed. 85;
National Park Bank v. Remsen, 158 U. S. 337;
Chase v. Curtis, 11 U. S. 452.

XI.

Your petitioner further avers that the present case is one in which it is proper for this Honorable Court to issue a writ of *certiorari*, for the following reasons, among others:

1. Because, as indicated by said decisions, there is conflict between the Circuit Court of Appeals for the Ninth Circuit and said federal and state courts touching the true interpretation to be accorded to said New Mexico statute and as to whether it is susceptible of enforcement in a jurisdiction where such statute is contrary to the spirit and policy of the laws thereof.

2. Because it is the peculiar province of this Honorable Court to bring about uniformity of decision and to reconcile if possible the conflict in the decisions of the lower federal courts and to co-ordinate in harmonizing the law on the subject of the *lex fori* where statutes alleged to be in conflict therewith are sought to be enforced or administered.

3. Because the New Mexico statute involved herein has not been passed upon by this Honorable Court.

4. Because the decision and opinion of the Circuit Court of Appeals in this case, it is submitted, greatly enlarges the scope and unreasonably widens the influence of said case of Huntington v. Attrill in that it permits a foreign statute to be enforced or administered when non-penal in the international sense, although such foreign statute may be opposed to the *lex fori*.

5. Because the decision and opinion of the Circuit Court of Appeals stretches the doctrine of said case of Huntington v. Attrill to an unreasonable extent and would apply the doctrine of that case to the instant case as a justification for the enforcement in California of a New Mexico statute, notwithstanding such New Mexico statute is obviously opposed to the policy of California.

6. Because the public interests, and the interests of jurisprudence, require the decision of this Honorable Court upon the questions of law involved herein.

7. Because the question of the enforcement in California of the New Mexico statute here involved is of sufficient general and material importance and interest as to make it necessary that it should be examined by the court of last resort.

Wherefore, your petitioner prays that this Honorable Court will be pleased to grant a writ of *certiorari* in this case to the Circuit Court of Appeals for the Ninth Circuit, to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

E. W. CAMP,
PAUL BURKS,
ROBERT BRENNAN,
Attorneys for Petitioner.

GARDINER LATHROP,
Of Counsel.

Verification.

United States of America, Southern District of California, Southern Division, City of Los Angeles—ss.

W. H. Brewer, being first duly sworn, says:

That he is an officer, to-wit, assistant to the general manager of The Atchison, Topeka and Santa Fe Railway Company, petitioner in the above entitled action, and as such makes this affidavit for and on behalf of said petitioner; that he has read the foregoing petition and that

the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters, he believes it to be true; that his knowledge is derived from the record in said cause and from the statements of counsel for petitioner duly communicated to him.

W. H. BREWER.

Subscribed and sworn to before me this..... day of March, 1923.

(Seal) NELLIE B. KEMPER,
Notary Public in and for the County of Los Angeles, State of California.

Certificate of Counsel.

I hereby certify that I have examined the foregoing petition and in my opinion said petition is well founded and the case is one in which the prayer of the petition should be granted by this Honorable Court.

E. W. CAMP,
Counsel for Petitioner.

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Brief in Support of Petition for Writ of Certiorari.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

No.....

In the Matter of the Petition of The Atchison, Topeka and Santa Fe Railway Company, a Corporation, for a Writ of Certiorari, Directed to the United States Circuit Court of Appeals for the Ninth Circuit, to Bring Before the Supreme Court the Case of O. J. Nichols,

Plaintiff in Error.

vs.

The Atchison, Topeka and Santa Fe Railway Company, a Corporation,

Defendant in Error.

Brief in Support of Petition for Writ of Certiorari.

Italics ours, unless otherwise indicated.

May It Please the Court:

The case which is here sought to have reviewed involves the enforcement in California, or in a Federal Court sitting in that state, of a statute of the state of New Mexico, copied from a statute of Missouri, which created a special action against public carriers alone in

favor of certain specified persons whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car or trains of cars or of any driver of any stage coach or other public conveyance; and which statute declared that for every passenger dying from any injury resulting from or occasioned by any default or any insufficiency in any such railroad, locomotive, stage coach or other public conveyance, the corporation or public carrier should *forfeit and pay* for every such person and passenger, so killed, the sum of $5,000.00.

The questions presented regarding this statute are those presented to this court for the first time.

The effect of the decision of reversal by the Honorable United States Circuit Court of Appeals for the Ninth Circuit, if allowed to stand, will be:

(a) To create a serious conflict between said Circuit Court of Appeals and a large number of federal and state courts touching the true interpretation to be accorded to said New Mexico or cognate statutes; and if valid, whether susceptible of enforcement in a jurisdiction like California where such statutes are contrary to

the spirit and opposed to the policy of the laws of that state.

(b) It will be, in effect, a judicial declaration that a statute of a foreign state, though non-penal in the international sense, may be enforced and administered in another jurisdiction, notwithstanding such foreign statute may be in conflict with and opposed to the policy of the state where it is sought to be enforced.

STATEMENT OF THE CASE.

Petitioner was at all the time here involved, a corporation engaged in the operation of a steam railroad from California to Chicago, operating regular passenger trains for the transportation of persons for hire. In June, 1920, Mary J. Nichols was a passenger on one of these trains; and when passing through the state of New Mexico, she was thrown from the car in which she was riding by a jerk or jar of the train and received injuries from which she died in the state of New Mexico on the 1st day of July, 1920.

O. J. Nichols, the husband of Mary J. Nichols (hereinafter referred to as the plaintiff in error) in his individual capacity, brought an action against your petitioner in the Superior Court of the state of California in and for the county of Los Angeles, for the death of his

wife, alleging that he had been thereby damaged in the loss of her services and advice in the sum of $15,000.00, in the loss of her society, love and affection in the sum of $20,000.00 and further damaged in the amount of $586.42 for expenses incident to the last illness and funeral of his wife, for railroad fare and various other specified expenses.

Your petitioner, the defendant in said action, within the time allowed by law asked for and secured the removal of said action into the United States District Court for the Southern District of California, Southern Division, on the ground of diversity of citizenship where the case was tried to the court without the intervention of a jury, a jury having been waived by written stipulation of the parties. Judgment went for your petitioner on findings and conclusions. The case was carried by the plaintiff in error to the United States Circuit Court of Appeals for the Ninth Circuit by writ of error. The assignment of error raised really but one question, namely, whether judgment should have been entered for your petitioner or should have been entered for the plaintiff in error for $5,000.00.

At the time when said action was commenced and during all of the times herein mentioned, the sole recovery allowed by the laws of New

Mexico against a common carrier for the death of a passenger resulting from or occasioned by negligent operation or by any defect or any insufficiency of any railroad or any part thereof or in any locomotive was and is that given by section 1820 of the New Mexico Annotated Statutes of 1915. That statute is also contained in the Compiled Laws of New Mexico of 1884 as section 2308, and in the Compiled Laws of the later edition as section 3212 and reads as follows:

> "Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employe whilst running, conducting or managing any locomotive, car or train of cars, or of any driver of any stage-coach or other public conveyance whilst in charge of same as driver, and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or in any stage-coach or other public conveyance, the corporation, individual or individuals in whose employ any such officer, agent, servant, employe, engineer or driver shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage-coach or other public conveyance at the time any injury is received resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying the sum of five thousand dollars, which may be sued for and recovered, First by the husband or

wife of the deceased, or, Second, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased, or, Third, if such deceased be a minor and unmarried, then by the father and mother who may join in the suit and each shall have an equal interest in the judgment, or, if either of them be dead then the survivor. In any suit instituted under this section it shall be competent for the defendant or his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency."

The Circuit Court of Appeals on the authority principally of Huntington v. Attrill, 146 U. S. 657, reversed the District Court holding that said section 1820 of the New Mexico statutes was non-penal in the international sense, and would be enforced in said cause and court for the benefit of the plaintiff in error [Tr. 67 to 75] and entered judgment reversing the judgment of the District Court in said cause and remanded the cause to said District Court with directions to enter judgment in favor of plaintiff in error for $5,000.00 with costs. [Tr. 75, 76.]

Within the time allowed by the rules of said Circuit Court of Appeals the petitioner requested and petitioned for a rehearing. An order was entered by said Circuit Court of Appeals denying said petition for a rehearing [Tr. 77], but staying its mandate.

The cause is therefore before this Honorable Court on the defendant's petition for a writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF THE ARGUMENT.

I.

The decision and opinion of the Honorable Circuit Court of Appeals for the Ninth Circuit is set out at pages 67 to 75, both inclusive, of the transcript.

The basic rule of law applicable in this case is stated in the opinion of the Circuit Court of Appeals in accordance with the contention of the petitioner and the ruling of the District Court as follows:

> "The defendant in error having removed the action from the court of the state in which it is brought on the sole ground of diversity of citizenship, this court must hold the case governed by the rules that would have controlled it had it not been so removed. It was so held in effect by this court in the case of N. P. Ry. Co. v. Kempton, 138 Fed. 992, 998, 999. See also, Spokane Inland E. Rd. v. Whitley, 237 U. S. 487, and cases there cited." [Tr. 68, 69.]

II.

Under the law of the forum—the law of California— the right to recover for death re-

sulting from injuries incurred as a passenger on a railroad train in New Mexico is only that given by said section 1820 of the laws of New Mexico and there can be no recovery, except such as is allowed by that statute:

McManus v. Canning Co., 37 Cal. App. 133;
Ryan v. No. Alaska S. Co., 153 Cal. 438;
Spokane v. Whitley, 237 U. S. 487;
Romero v. Ry. Co., 11 N. M. 679, 72 Pac. 37;
Clay v. Ry. Co., Texas, 228 S. W. 907;
Phoenix R. R. v. Landis, 231 U. S. 578;
Barnes v. Alexander, 232 U. S. 117;
Northern Pacific v. Hambly, 154 U. S. 349;
Ryan v. North Alaska S. Co., 153 Cal. 438;
St. Louis Ry. Co. v. Seale, 229 U. S. 156;
Kramer v. Ry. Co., 25 Cal. 434;
Spokane, Etc., v. Whitley, 237 U. S. 487;
Gallagher v. Ry. Co., 196 Fed. 1000;
McClain v. Ins. Co., 110 Fed. 80 (91);
Cox v. T. & P., 145 U. S. 593;
Ill. Cent. v. Ihlenberg, 75 Fed. 873;
Spokane I. E. R. Co. v. Whitley, 237 U. S. 487;
Wilson v. Tootle, 55 Fed. 211;
Hopper v. Denver etc., R. Co., 155 Fed. 273;

Derrickson v. Smith, 27 N. J. L. 166;
Bird v. Hayden, 1 Robertson, N. Y., 383;
Pickering v. Fisk, 6 Vt. 102;
Ind. Etc. v. John *et al.*. 5 Hammond (Ohio), 217;
Finney v. Guy, 189 U. S. 335, 47 L. Ed. 839;
Minor on Conflict of Laws, section 10;
Leonard v. Col. Steam Nav. Co., 9 Heisk (N. Y.) 852;
Texas & Pac. Ry. Co. v. Cox, 145 U. S. 593;
Grier v. Kansas City Etc. Ry. Co., 228 S. W. R. (Mo.) 454;
Pryor v. Payne, 244 S. W. R. (Springfield Court of Appeals Mo.), 369.

III.

There can be no recovery in California either in the state or federal court under section 1820 of the New Mexico statutes because the policy of that statute is opposed to the policy of the state of California.

Lange v. Schoettler, 115 Cal. 388;
Bond v. United Railroads, 159 Cal. 270;
Redfield v. Ry. Co., 110 Cal. 277;
Parsons v. Easton, 184 Cal. 765;
Dale v. Atchison, 57 Kan. 601, 47 Pac. 521;

Slater v. Mex. Nat. Co., 194 U. S. 120;
Matheson v. Ry. Co., 61 Kan. 667, 60 Pac. 747;
Christilly v. Warner, 87 Conn. 461, 88 Atl. 711;
Raisor v. R. R. Co., 215 Ill. 47, 74 N. E. 69;
Romero v. Ry. Co., 11 N. M. 679, 72 Pac. 37;
Marshall v. Ry., 46 Fed. 269;
Clay v. Ry. (Tex.), 228 S. W. 907;
Casey v. Ry. 116 Mo. App. 235, 91 S. W. 419;
Huntington v. Attrill, 146 U. S. 657;
Moss v. Smith, 171 Cal. 777;
Patterson v. Thompson, 86 Fed. 85;
Bank v. Remsen, 158 U. S. 337;
Mo. Pacific v. Ault, 256 U. S. 557;
Boston, Etc. v. Hurd, 108 Fed. 116;
Hill v. Boston, Etc., 77 N. H. 151, 89 Atl. 482;
Armbruster v. Ry., 166 Iowa 155, 147 N. W. 337;
Story v. Green, 164 Cal. 768.

ARGUMENT.

I.

The said Circuit Court of Appeals, in accordance with petitioner's contention and the ruling of the District Court, having held that

the case is governed by the rule that would have controlled it had it not been removed into the Federal Court and having also held that plaintiff can recover in this action, if at all, under section 1820 only, of said New Mexico statute, we suggest what we conceive to be the sole question in this case, namely:

Could or could not the plaintiff in error in this case have recovered in the state court had the case not been removed to the federal court?

The opinion of the Circuit Court of Appeals proceeds, we respectfully submit, upon the assumption that plaintiff in error could have recovered in the state of California unless the New Mexico statute is to be regarded as penal.

But we respectfully submit that to determine the New Mexico statute non-penal is not an answer to the question whether the plaintiff could have recovered in the state court of California.

For state courts have frequently refused a recovery upon a foreign statute, not on the ground that the foreign statute was penal, but on the ground that the foreign statute declared a policy of law inconsistent with the policy of the forum in which the suit was brought.

This is illustrated in the case of McManus v. Canning Co., 37 Cal. App. 133, where the court said:

> "Respondent's next contention is that plaintiff's alleged right of action for the wrongful death of his intestate, as given by the statutes of Alaska is contrary to the policy of the law of California and will not be enforced here. The statutes pleaded by plaintiff are section 1185 of the compiled laws of Alaska of 1913, codified by authority of the Act of Congress of August 24, 1912, chapter 387, section 19, 37 Stats. 518, and chapter 45 of the Session Laws of the Territory of Alaska, for 1913, approved April 3, 1913."

The court then quotes the statutes of Alaska and proceeds at the bottom of page 136:

> "It is settled law that an action for wrongful death like other actions on tort is governed by the law of the jurisdiction where the tort was committed, and as it is a transitory action it may be maintained in any jurisdiction where the defendant is found (citing cases) *unless the court where the suit is brought in enforcing the remedy would be acting in conflict with the express provisions or the general policy of the law* of its own jurisdiction. (Citing authority.)"

Then after discussing the meaning of the Alaska statute, section 1185, the court says, referring to a decision of said Ninth Circuit Court of Appeals:

> "It was there held that section 1185, like the Oregon statute from which it was originally taken, confers a right of action for wrongful death upon the personal representative of the decedent for the benefit of

the estate and that any damages recovered become assets of the estate to be administered like any other assets. The creditors and the expenses of administration are to be paid out therefrom, if necessary, the balance going to the heirs, if there are any, and in default of heirs the state takes by escheat. We fully agree with counsel for respondent that this right of action created by section 1185 is contrary to the policy of the laws of California, for our Legislature in creating the action for wrongful death, which was unknown at common law, followed the provisions of Lord Campbell's Act adopted by Parliament in 1846, and our courts have adopted the construction given that act in Great Britain and in those states which have similar laws, namely that the action for wrongful death has been created for the benefit of those relatives of the decedent who have the right to look to him for aid and support, and that the damages to be given are limited to the actual pecuniary loss suffered by those relatives by being deprived of said aid.

"Therefore, if appellant's right of action rested on section 1185 alone, we would be compelled to hold that the action could not be maintained, for it would not be in accord with the policy of our laws to make a resident of our state pay damages for the death of decedent where no one was shown to have suffered any pecuniary loss thereby."

There was in the foregoing case of McManus no question of a penal statute, but solely a question of a difference in policy, and while

the courts of California have not been called upon to determine the consistency or inconsistency of the policy of California with the policy of the New Mexico statute, certainly the New Mexico statute is much further removed in policy from the law of California and the policy of California than was the Alaska statute under which the California court held that no recovery could be had in this state.

To the point that the policy of the New Mexico statute is opposed to the established policy of the state of California we invite attention to the fact that the New Mexico statute, or the same statute of Missouri, has been the ground of action in Kansas, in Texas, in Illinois, in Iowa, and while some of the cases have spoken of the statute as penal, yet they have also declared that the policy of the statute is at variance with the policy of the forum and in every case have refused a recovery. What possible ground is there for assuming that California would be the one only state to allow recovery under the New Mexico statute?

As "death statutes" have been almost universally enacted, the discussion of "policy" usually turns on the extent of similarity between the local and foreign enactments.

If a right of action is given by a statute (not of a penal nature) of the state in which the injury and death occurred, the remedy may

be enforced in any tribunal having jurisdiction of the defendant, *provided,* of course, that a substantially similar statute exists in the state of the tribunal. We do not claim that it is essential that the statute be precisely the same, but if it is of similar import and character it will suffice.

This, we understand, is the ruling in:

Leonard v. Col. Steam Nav. Co., 9 Heisk (N. Y.) 852;

Tex. & Pac. Ry. Co. v. Cox, 145 U. S. 593.

Without discussing in detail the questions of the similarity and dissimilarity of the various statutes involved in the many decisions on this subject, it is enough to say that where the foreign statutes were enforced, there was no substantial dissimilarity between the statutes involved and those of the forum. But in every case where either the Missouri or New Mexico statute was sought to be enforced or administered in a state other than that in which enacted, the state tribunals refused to administer or enforce either of said statutes upon the ground that such statutes were opposed to the *lex fori.*

II.

The Policy of Section 1820 of the Statutes of New Mexico Is Opposed to the Policy of the State of California and It Is Submitted That There Is Nothing in the Case of Huntington v. Attrill, 146 U. S. 657, That Is Authority for the Enforcement in California of Said Section of the New Mexico Statute.

The Circuit Court of Appeals rests its opinion on the theory that the instant case is ruled by the case of Huntington v. Attrill, 146 U. S. 657. But it was not necessary to a decision in that case to determine whether the New York statute there under consideration was remedial or penal, since the appeal was founded upon the "full faith and credit" clause of the Federal Constitution. Really the decision was based upon a consideration of the remedial provision of the statute in its protective aspect to a creditor:

Patterson v. Thompson, 86 Fed. 85;
National Park Bank v. Remsen, 158 U. S. 337;
Chase v. Curtis, 113 U. S. 452.

In the footnotes to section 10 of Minor on Conflict of Laws, may be found an illuminating discussion of the case of Huntington v. Attrill, 146 U. S. 657. The writer points out that it was not necessary to a decision in that

case to decide whether the New York statute was penal, since the appeal was founded upon the "full faith and credit" clause of the Federal Constitution. The pertinent observations of the author are those respecting the enforcement of the foreign statute under rules of private international law and international comity. We quote what is there said because it is so peculiarly applicable to the situation here:

> "But in private international law, the ground of the enforcement of a foreign law is international comity, which is nothing more than the enlightened sentiment that exact justice may be meted out by requiring that a man's acts should be governed by the law under which he acts, provided the enforcement of that law will not conduce to injustice nor affect the interests of the forum. But if to hold a wrongdoer liable in double or treble damages to the party injured is not punishment to the former, it is certainly more than justice to the latter. *Justice* to him is satisfied by *compensatory* damages. Hence the forum, in endeavoring to mete out exact justice to the parties by enforcing a foreign law rather than its own, will find itself, under this view rendering to the injured party more than justice requires, and at the expense of the other litigant. He has a right to demand this under the *municipal* law, not because of justice, but because the positive law requires or permits it. But where he seeks to enforce his claim in another state, what right has he to ask this of the forum whose policy may be entirely different?"

So in the instant case, if the plaintiff were suing under California law for damages for alleged wrongful death in the courts of that state, he would be limited to the pecuniary loss suffered, as disclosed by the evidence, whereas, by invoking and seeking to enforce the provisions of the New Mexico law, assuming that actionable negligence has been shown, he recovers the arbitrary sum of $5000.00.

Prior to 1905 the Missouri statute read, so far as material here,

"shall forfeit and pay the sum of $5000."

In 1905 this statute was amended so as to read,

> "* * * shall forfeit and pay as a penalty, for every such person * * * so dying, the sum of not less than $2,000, and not exceeding $10,000, in the discretion of the jury, which may be sued for and recovered * * * by,"

In the case of Grier v. Kansas City etc. Ry. Co. (228 S. W. R. 454), the Supreme Court of Missouri held that this statute was penal as to all amounts that might be recovered thereunder, and that it was in no sense compensatory as to sums exceeding $2000.00; the legislative purpose being to allow the jury to assess the punishment in accordance with the negligence and the loss.

Accordingly, the Springfield Court of Appeals of Missouri in the case of Pryor v. Payne (244 S. W. R. 369) held that there could be no recovery under this statute for the death of a traveler on a highway crossed by the railroad, against the Director General of Railroads because of any neglect in the operation of railroad trains, since such statute is purely penal and in no sense compensatory.

The case of The State of Indiana for the use of Cone v. John *et al.*, 5 Hammond (Ohio) 217, was an action on an official bond prescribed by the laws of Indiana and which allowed recovery to anyone injured by official default, to treble damages, full costs and charges. The Ohio court refused to enforce the remedy and said:

> "A state can enforce its contracts in our courts, the same as an individual suitor; but the remedy must be afforded according to our laws and practice."

Derrickson v. Smith, 27 N. J. L. 166:

This was an action in the New Jersey Circuit Court founded upon a statute of New York requiring corporations to file and publish annual reports, showing the condition of their affairs; a failure to file and publish such reports made the trustees jointly and severally liable for all debts then existing.

It was held that this statute could not be enforced in New Jersey because it was in the nature of a penalty for official neglect of duty.

Bird v. Hayden, 1 Robertson, N. Y. 383:

In that case it was held that personal liability imposed by Massachusetts statute upon the officers of a corporation who neglected or refused the performance of a duty, with which they were charged by the statute, was in the nature of a penalty, and designed as punishment for such neglect, and the New York court refused to enforce the statute.

Pickering v. Fisk, 6 Vt. 102:

This was an action on a sheriff's bond executed in the state of New Hampshire for the public security; that an action might be brought thereon for the benefit of anyone injured by official default. The Vermont court refused to entertain an action against the sheriff and his bondsmen, giving as reasons therefor that:

> "no sovereign state is bound by the laws of another, nor can the laws of another state operate *proprio vigore* within it. The observance of foreign laws rests in comity and convenience, and is a disposition of courts to adapt their proceedings to the great ends of justice. But there is a limit to this principle of comity; and cases may and do arise, where the observance of foreign laws would neither be convenient, nor answer the purposes of justice. For-

> eign laws, therefore, are not regarded, where they are irreconcilable with our own regulations, nor where, in our opinion, they conflict with our established policy."

Finney v. Guy, 189 U. S. 335:

This action was commenced in the proper court of the state of Wisconsin to enforce the shareholders' liability under a Minnesota statute, in a corporation in Minnesota and doing business in that state. A demurrer was interposed to the complaint. The demurrer was overruled by the trial court and judgment given for the plaintiff, which was reversed by the Supreme Court of the state. The case was taken to this Honorable Court by the plaintiff to review the judgment of reversal. Under the Minnesota laws as construed by its courts, the only remedy provided for the enforcement of the liability of stockholders in domestic corporations was a suit in equity in that state by a creditor in behalf of himself and all other creditors against the stockholders who could be served with process. This Honorable Court held that the courts of Wisconsin did not deny full faith and credit to a judgment of the Minnesota court against resident stockholders by denying the right to maintain a further action to enforce such liability outside the state. The court further said:

> "Whether, aside from the federal considerations just discussed the Wisconsin court should have permitted this action to be

> maintained, because of the principle of comity between the states, is a question exclusively for the courts of that state to decide. The right to maintain it under the facts of this case is not founded upon any provision of a federal nature, and we cannot supervise the action of the Wisconsin court in this particular. The judgment of the Supreme Court of Wisconsin must be affirmed."

Under the law of California "the damages are limited to the pecuniary loss suffered by the person or persons for whose benefit the right of action is given, from the death or injury of the victim."

Bond v. United Railways, 159 Cal. 277.

Nor can exemplary damages be awarded even if the act causing death was wanton, since section 377 of the California Code of Civil Procedure is a new action and not the action which the deceased might have brought for the wrong had he survived.

Hence, only such damages can be recovered as the statute authorizes, and cannot include any grievance personal to the deceased nor any "damage allowed in the interests of the people as punishment."

Lange v. Schoettler, 115 Cal. 388.

In the case of Hopper v. Denver, etc., R. Co., 155 Fed. (Eighth C. C. A.) 273, the court

had under consideration a Colorado statute which created an action for death negligently caused by a public carrier and which statute declared that every such public carrier should forfeit for every person and passenger, so injured or killed, not more than $5,000.00 nor less than $3,000.00. The question of the validity of that statute was left open and the court also passed over, without deciding, whether the statute, if valid, could be enforced outside of the state court of Colorado. In other words, the court left open the question as to whether the Colorado statute could be enforced or administered in a federal court sitting in Colorado. Mr. Justice Van Devanter, speaking for the court, made this very pertinent observation:

> "It may be that in the further progress of the case it will become necessary to consider whether the provision in section 1508 for a minimum recovery of $3,000.00, irrespective of actual pecuniary injury, is valid, and, if so, whether that section is thereby made penal in the sense that it may be enforced only in the courts of Colorado * * *."

This observation was prompted doubtless by the long list of cases on the subject which are cited in the court's opinion, many of which are referred to in this brief and all of which are cited in the petition for the writ of certiorari herein.

If the enforcement of the Colorado statute in a federal court, sitting in that state, was a question of serious doubt, obviously, it ought to be decisive of the proposition that the New Mexico statute here involved cannot be enforced or administered in California or in a federal court sitting in that state, and that the New Mexico statute can be enforced or administered if at all in a state court of New Mexico only.

III.

Under the New Mexico statute, if the plaintiff recover he will recover five thousand dollars, neither less nor more.

Romero v. Atchison, 11 N. M. 679, 72 Pac. 37;
Dale v. Atchison, 57 Kan. 601, 47 Pac. 521;
Marshall v. Wabash, 46 Fed. 269;
Clay v. Ry. Co. (Tex.), 228 S. W. 907.

He recovers this amount without proof of damage, with no opportunity afforded the defendant to show that no damage has resulted.

Casey v. St. Louis Etc., 116 Mo. App. 235, 91 S. W. 419;
Raisor v. Chicago Etc., 215 Ill. 47, 74 N. E. 69.

But the policy of California is that the amount of the damages in such cases shall be

determined according to the evidence of pecuniary loss and that they shall be strictly compensatory for the pecuniary loss as proved.

Section 377, Code of Civil Procedure, reads as follows:

> "When the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an act for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other persons. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

This section has, of course, been under consideration in the courts of California many times. Thus in the case of Lange v. Schoettler, 115 California 388, Mr. Justice Temple, writing the opinion of the court, said:

> "The first point, although apparently based upon the alleged insufficiency of the evidence, is that the jury was erroneously instructed that they could allow exemplary damages, if the act causing death was wanton, cruel and malicious. I think this instruction erroneous and that it was probably given under much misapprehension as to our statutes upon the subject. It has been uniformly ruled that the action provided for in section 376 of the Code of Civil Procedure is a new action and not the action

which the deceased might have brought for the wrong had he survived. Only such damages can be recovered as the statute authorizes and in the absence of an express provision authorizing a different rule the only damage allowed is for the probable value of the life to those in whose behalf the action is brought. Of course this cannot include any grievance personal to the deceased or any *damage allowed in the interest of the people as punishment.*

* * * * * * *

"The statute of 1862 expressly allowed the jury to give exemplary damages, and this provision was carried into the first editions of the codes. It authorized such damages 'pecuniary and exemplary' as the jury should deem just. In 1874, section 377 was amended by striking out the words 'pecuniary and exemplary.' The purpose of this amendment must have been to take away the right to exemplary damages and to make the rule accord with the general rule elsewhere.

"The decisions upon this matter are cited and discussed in Munro v. Pacific Co., 84 Cal. 515. In that case, while holding that in the case of a wife or mother, showing under the statutes the jury may take into consideration the loss of the comfort, society and protection of the deceased, yet the remark of Mr. Justice Wills that the subject matter of the statute is compensation for injury by reason of the deceased not being alive, is quoted with approval, and it is declared that the recovery can only be for the pecuniary injury to the relative. In the same case an instruction was given that the jury must not allow exemplary damages, but could consider the sorrow,

> grief, etc., of the mother. Instruction was held erroneous solely because it allowed damages for the grief occasioned by the death, and because such injury is not a pecuniary loss."

In Redfield v. Oakland Ry., Etc., 110 Cal. 277, the opinion said it is contended by appellant that so many states have determined that it is wise to limit the amount that can be recovered as damages in cases like the present that we should look to such limits in determining the amount to be recovered and be governed thereby; but such statutes were in existence long before section 377 of the Code of Civil Procedure was enacted, and this provision of the code is a direct *determination of our Legislature that the policy adopted by other states in that regard should not exist here.*

In Parsons v. Easton, 184 Cal. 765, opinion by Justice Shaw, at page 770, he quotes from Bond v. United Railways, 159 Cal. 277:

> "The damages are limited to the pecuniary loss suffered by the person or persons for whose benefit the right of action is given, from the death or injury of the victim."

In the case of Parsons against Easton, a verdict of $6,000.00 was held to be clearly greater than the evidence warranted for the death of a son 27½ years of age, who had been

at times insane, and who was somewhat deformed.

The courts of California have not been asked to enforce this statute of New Mexico, but the courts of other states having the same policy that California has concerning measure of damages, have repeatedly refused to allow recovery under the New Mexico statute or under the statute of Missouri from which the New Mexico statute was copied.

In Raisor v. Chicago & A. R. Co., 215 Ill. 47, 74 N. E. 69, the court, after discussing the statute of Missouri, which was the same as the statute of New Mexico, said near the close of the opinion:

> "Is the Missouri statute contrary to the public policy of this state? In order to ascertain the policy of the state in respect to any matter, the acts of the legislative department must be looked to. It is not within the province of the courts to create public policy. Their province is limited to declaring it when ascertained. (Citing cases.) In 1845 the Legislature adopted as the law of this state the common law of England and all statutes or acts of the British Parliament made in aid thereof and to supply the defects of the common law prior to the 4th year of James the First. This includes the common law forms of action, *ex contractu* and *ex delicto*, and at common law the plaintiff in an action *ex delicto* or in any action sounding in damages cannot recover substantial damages

without proof that he has suffered some. Two elements must concur to entitle the plaintiff to recover substantial damages—injury and actual damages—and these two must be proved. On proof of injury alone nominal damages may be recovered, as the law presumes some damage on proof of injury. But there can be no recovery of actual or substantial damage in the absence of proof thereof. But the Legislature has expressed itself with regard to the very subject matter of the present suit, namely the death of a person caused by wrongful act, neglect or default. In such case an action may be brought in the name of the personal representative of the deceased for the benefit of the widow and next of kin. But the statute contains the provision: 'In every such action the jury may give such damages as they shall deem a fair a just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding $10,000.' (Citing the statute.) Our statute is substantially a copy of the first two sections of 9 and 10 Victoria, chapter 93, and of the New York statutes on the same subject, and it has been held in England, New York and this state that the pecuniary loss to the widow and next of kin is the sole measure of damages and that when there has been no pecuniary loss there can be no recovery. (Citing cases.) It is therefore as we think contrary to the policy of this state as evidenced by the acts of the Legislature to permit a recovery for damages on mere proof of neglect or default of the defendant and without proof that the plaintiff has suffered any pecuniary loss."

In Marshall v. Wabash, 46 Fed. 269, in considering the same Missouri statute, Judge Sage said:

> "Where the plaintiff is not required to offer any evidence proving damages and the defendant is not permitted to offer any evidence disproving damages, and the recovery is to be one fixed sum in every case, I cannot understand how the statute under which that is done can be regarded as providing compensation merely and not penal."

Judge Sage makes this very pertinent suggestion:

> "I doubt whether the Legislature has the power to enact a statutory provision for liquidated damages even where it has the right to create a cause of action. It may for reasons of public policy enact and enforce a penal statute and provide that the plaintiff shall have the benefit of the penalty, but if the statutory damages are to be treated as compensatory merely, it strikes me that the attempt of the Legislature to fix them by an arbitarary, inflexible rule, would be in conflict with the constitutional right of the defendant to a jury trial."

The New Mexico statute itself came before the court of Kansas in Dale v. Atchison, 57 Kas. 601, 47 Pac. 521, the court saying that it was the same in substance as the Missouri statute which had been under consideration in Hamilton v. Ry., 39 Kas. 56, 18 Pac. 57; that it had been held by the courts of Missouri that

the recovery must be for the full amount and nothing less, and that a verdict for half the amount, or $2500.00, would be set aside by the court, and adds:

> "Another and perhaps more serious difficulty lies in the penal character of the statute of New Mexico, although it is argued that the law of that territory provided for the payment by the wrongdoer of a sum of money to his widow or minor children and that they are the ones usually, if not invariably, the most injured by his death, and that the money to be paid under that statute subserved really the same purpose as money paid under the laws of Kansas, and compensates them in some degree for the loss of husband and father, it is apparent that the theory of the law of the two states is different. In Kansas it is strictly compensatory. In New Mexico it may be strictly penal, for it might happen that the person killed was a burden upon his family, contributing nothing to them."

And the court felt constrained to hold "that the courts of this state will not undertake the enforcement of a statute penal in part and *so dissimilar in principle from the law of our own state.*"

In Clay v. Ry. Co. (Tex.), 228 S. W. 907, the court remarked that the recovery provided for by section 1820 of the statute of New Mexico is inflexible and is aimed at the culpability of employes of the railway company rather than

based upon the extent of injury, thus partaking more of the nature of a penalty than of a right created.

Mattheson v. Kansas City, Etc., Ry. Co., 61 Kansas 667, 60 Pacific 747, involved the statute of Missouri to which reference has already been made in this brief. The court referred to the Dale case, already cited, and adds that an arbitrary award of a fixed amount of damages regardless of pecuniary loss sustained is antagonistic to the policy of Kansas, and is palpably inconsistent with the Kansas statute authorizing a recovery in such cases, where the plaintiff must show a pecuniary loss and the recovery is limited to the actual damages sustained. If the life of the deceased is of no pecuniary value to the next of kin, no more than nominal damages can be recovered.

> "There have been a number of such cases, illustration of which can be found in Railroad Company v. Weber, 33 Kansas 543, 6 Pacific 877, where the jury especially found that the life of the deceased was of no pecuniary value to those for whose benefit the action was prosecuted. The arbitrary fixture of $5,000 in such a case arising under the Missouri statute would be peculiarly punitive, and the fact that the penalty was bestowed on relative of the deceased would not take away the penal character of the award. It is contended that the statute is not penal and cannot be so regarded, unless the penalty is

> paid to the state as a punishment for the wrong committed. In a strict and limited sense, a penal statute is one imposing punishment for an offense committed against the state."

Christilly v. Warner, 87 Conn. 461, 88 Atlantic 711, was an action brought in the state court of Connecticut to recover for wrongful death suffered in Massachusetts. The court lays down certain general principles and discusses the Massachusetts statute as it gradually developed into its present form (which permits a recovery of not less than $500 or more than $10,000, to be assessed with reference to the degree of defendant's culpability or that of his agents or servants), and then said:

> "We have never allowed a recovery in a case of a negligent death upon any theory save that upon just compensation. We have never penalized for such a wrong. To permit this to be done would be against our public policy and comity does not require that we enforce the statute of a foreign jurisdiction which is so manifestly contrary to the public policy of our law."

Some of these opinions characterize the New Mexico and Missouri statutes as "penal." It i not penal according to the strict use of that term as explained and elaborated in Huntington v. Attrill, 146 U. S. 657, quoted by plaintiff in error at pages 7 to 21. But the New

Mexico statute is penal in the common use of the term; that is, it imposes a penalty.

In Moss v. Smith, 171 Cal. 777 (784) it is said:

> "Huntington v. Attrill, 146 U. S. 657, upon which appellants rely as supporting their contention that section 309 is a remedial and not a penal statute is explained by Judge Gilbert in Patterson v. Thompson, 86 Fed. 85, who shows that the question before the Supreme Court was solely whether such statutes were penal law in the sense in which the word is used in international law."

The same statute that was under consideration in Huntington v. Attrill was again before this Honorable Court in International Park Bank v. Remsen, 158 U. S. 337, and it was distinctly declared to be in its nature a penal statute as had previously been held in Chase v. Curtis, 113 U. S. 452.

In Patterson v. Thompson, 86 Fed. 85, involving the personal liability under the Oregon statute of a director in a saving bank, it is said (p. 87):

> "Counsel for plaintiff contended that by the decision in Huntington v. Attrill, 146 U. S. 657, the Supreme Court has overruled its former holding that such a statute is penal. It will be seen, however, on careful consideration of that case, that the decision was based upon a consideration of

> the remedial purpose of the statute and the protection intended to the creditor, and that the court went no further than to hold that such a statute is not penal in the sense that it will not be enforced in a state other than that in which the liability was created. In the later case of Bank v. Remsen, 158 U. S. 337, it was again ruled that such a statute is one of a penal character, and in the opinion the court remarked that the purport of the decision in Huntington v. Attrill was that such a statute was not a penal law in the international sense."

National Park Bank v. Remsen, 158 U S. 337; opinion by Justice Brewer; suit for recovery under New York statute for failure of directors to make report (page 342), the opinion says:

> "That this statute is one of a penal character is settled, not merely by various decisions of the court of appeals of New York, but also expressly by this court in Chase v. Curtis, 113 U. S. 452, though as since held not a penal law in the international sense. Huntington v. Attrill, 146 U. S. 657."

Mo. Pac. v. Ault, 256 U. S. 554, was a suit to recover wages under a statute of Arkansas providing that if a railroad company should discharge an employe it shall pay him his full wages within seven days, otherwise as a penalty for such non-payment the wages of such employe should continue at the same rate until

paid. In the lower court Ault recovered $50.00, his wages up to the time of discharge and $390.00, wages from that date on. The court held that everything above $50.00 was penalty or forfeiture, but said it was in the nature of a punishment; that the Supreme Court of Arkansas had held that it was not technically a penalty, but was allowed for a double purpose, namely as compensation for delay and as punishment for failure to pay; that it had all the elements of exemplary damages. This Honorable Court said:

> "Whatever name be applied, the element of punishment clearly predominates."

And that the judgment against the director general so far as it provided for recovery of the *penalty* was erroneous.

But the principle underlying all the opinions which we have cited, denying recovery of arbitrary amounts fixed by the law of another state, is really that those statutes are contrary to the policy of the forum. If the law of the forum gave similar right, the court would sustain a complaint under the foreign law.

It is also true that the doctrine of Huntington v. Attrill requires a court of California to permit recovery upon a judgment recovered in another state, although that judgment was obtained on a complaint which would not be held

to state a cause of action in California. For instance, if a plaintiff recovers judgment in Louisiana on a gambling contract, he may sue on that judgment in California and recover, although he could not have recovered here on the contract itself. He must still reduce his demand, whatever it be, to judgment in a court of some jurisdiction whose policy permits recovery on such a demand. Thus the federal court sitting in New Hampshire will entertain an action on the Massachusetts statute, giving a recovery of damages for wrongful death and not measuring the damages by the rule of compensation.

Boston, Etc. v. Hurd, 108 Fed. 116.

That accords with the policy of New Hampshire.

Hill v. Boston etc., 77 N. H. 151, 89 Atl. 482.

The case of Huntington v. Attrill was decided in 1892, thirty years ago; and ever since then the courts, both state and federal, have gone on as before enforcing the policy of the *lex fori* and uniformly refusing judgment contrary to that policy; with the single exception that in a suit on a judgment obtained in a sister state on due process of law in an action not strictly penal, the respective policies of the two states cannot be considered.

Before the decision of Huntington v. Attrill, the statute here in question or the like statute of Missouri had been attempted to be used as a basis of recovery in the federal court in Ohio:

Marshall v. Ry. Co., 46 Fed. 269;

and since that decision in the state courts of Texas:

Clay v. Ry. (Tex.), 228 S. W. 907.

Kansas:

Dale v. Atchison, 57 Kan. 601, 47 Pac. 521;

Matheson v. Ry. Co., 61 Kan. 667, 60 Pac. 747.

Iowa:

Armbruster v. Ry. Co., 166 Iowa 155, 147 N. W. 337.

Illinois:

Raisor v. Ry. Co., 215 Ill. 47, 74 N. E. 69.

And in every instance where either of these statutes has been made the basis of an action in another state, either before or since the case of Huntington v. Attrill, recovery has been refused.

A similar case is

Christilly v. Warner, 87 Conn. 461 (1913), 88 Atl. 711.

Defendant negligently killed a child in Massachusetts, where the statute provided that he

should be liable in damages in the sum of not less than $500 nor more than $10,000, to be assessed with reference to the degree of his culpability, one-half to be for the use of the widow and one-half for the use of the children of the deceased, or if no widow the whole to the use of the next of kin. The court said:

> "We do not enforce the foreign statutes which are penal. We do not enforce the law of another jurisdiction which we conceive to be injurious to our public rights or to the interests of our citizens or which offend our morals or contravene our public policy or violate our positive laws. We have never allowed a recovery in a case of negligent death upon any theory save that of just compensation. We have never penalized for such a wrong. To permit this to be done would be against our public policy and comity does not require that we enforce the statute of a foreign jurisdiction which is so manifestly contrary to the public policy of our law." (Citing cases.)

Again:

It is contrary to the public policy of California to differentiate between common carriers and other defendants in personal injury cases with respect to the measure of damages. In this state the rule of compensation applies in favor of all and against all, so that neither plaintiff's poverty nor defendant's wealth shall be permitted to augment damages for simple negligence.

Story v. Green, 164 Cal. 768.

The refusal of state courts to entertain actions on foreign laws not harmonizing with the policy of the forum is not condemned by this Honorable Court—is indeed approved and adopted.

Slater v. Mexican National R. Co., 194 U. S. 120, 48 L. Ed. 900, was an action in the federal court in Texas to recover for death suffered in Mexico. The court considers the Mexican statute and the provisions made by that statute with respect to decree, damages and parties benefited, and adds:

> "The present action is a suit at common law and the court has no power to make a decree of this kind contemplated by the Mexican statute. What the Circuit Court did was to disregard the principles of the Mexican statute altogether and to follow the Texas statute. This clearly was wrong and was excepted to specifically. * * * Evidently the Texas courts would deem the dissimilarities between the local law and that of Mexico too great to permit an action in the Texas state courts." (Citing cases.)

IV.

It is submitted that section 1820 of the New Mexico statutes upon which plaintiff's alleged cause of action is predicated, which arbitrarily declares a forfeiture and requires the payment of $5,000.00 neither less nor more exclusively

in the case of the death of a person resulting from injuries incurred while a passenger upon a railway or stage line, is so widely at variance with and so radically different from the settled policy of California, respecting the measure of damages, that such foreign statute would not be administered or enforced by the courts of California.

It is further submitted that the New Mexico statute is directly opposed to the policy of California in that it treats common carriers, in case of the death through negligence of a person as passenger thereon, as *sui generis*, whereas, in California, but one cause of action is given, a single standard of liability created, against all *tort feasors*, be they individuals, corporations or common carriers. It is perceived that the New Mexico statute is further radically different in that regard and that these are material departures from California laws and policies.

In conclusion, we respectfully submit that upon the authorities cited and for the reasons hereinbefore given, including the reasons urged in the petition for the writ of certiorari herein, that section 1820 of the statutes of New Mexico is not enforcible for the benefit of the plaintiff in error in this action.

Therefore, it is submitted that the judgment of the Circuit Court of Appeals ought to be

reversed; and the judgment of the United States District Court for the Southern District of California, Southern Division, in favor of the petitioner, affirmed.

March 15, 1923.

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